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Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
October Term, 1995

SHAWNA SNYDER,

Petitioner,

v.

JOSEPH VIANI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Were petitioner's due process rights under the Fourteenth Amendment violated by the manner in which the Nevada Supreme Court affirmed an adverse summary judgment in her "dramshop liability" wrongful death action against a tavern owner--who illegally sold liquor to petitioner's under-age brother--causing her brother to become intoxicated and, in turn, fatally injured in a highway collision, where:

1. The justice of the Nevada Supreme Court, who cast the deciding vote in a 3-to-2 decision against petitioner, himself owned a tavern and gambling hall which sold liquor, where the justice failed to disclose the ownership to petitioner, and where the justice's liquor and gambling business was enhanced by his decision against petitioner, and

2. The same supreme court justice, in violation of a Nevada statute, sat on petitioner's timely motion for rehearing her appeal and her motion to disqualify him from her case, and again cast the deciding vote against her, in another 3-to-2 decision that benefitted the justice personally, by enhancing his financial interest in the liquor industry?

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SHAWNA SNYDER,

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JOSEPH VIANI,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

Petitioner SHAWNA SNYDER respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nevada, which affirmed summary judgment against petitioner, denied her motion for rehearing, and denied her motion to disqualify a supreme court justice from sitting on her case, which she made after learning that the justice's personal financial interests had benefitted by his deciding vote against her, thereby violating petitioner's right to procedural Due Process of Law under the Fourteenth Amendment.

OPINIONS BELOW

The Nevada Supreme Court issued two opinions. The first is reported at *Snyder v. Viani*, 110 Nev. 1339, 885 P.2d 610 (1994). The second is reported at *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170 (1996). Both are reprinted in the Appendix. App. 1a, 17a. The trial court's order granting summary judgment against petitioner's wrongful death suit against the vendor of alcohol illegally sold to her under-age brother, which the Nevada Supreme Court affirmed, is unpublished.

Remittitur issued on May 13, 1996, ten days after the Nevada Supreme Court filed its second opinion.

JURISDICTION

The Nevada Supreme Court entered its original decision on November 30, 1994. App 1a. Petitioner filed a timely motion to disqualify Justice Rose, vacate the court's opinion, and for reargument on the merits of her appeal. Petitioner's motions were denied on May 3, 1996 by Justices Rose, Shearing and Young. App. 17a. Justices Steffen and Springer filed separate dissenting opinions. App. 38a. This petition has been filed within ninety days of that date. Jurisdiction exists under 28 U.S.C., sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On November 30, 1994, the Nevada Supreme Court issued an opinion affirming summary judgment against petitioner, SHAWNA SNYDER, summarily denying her wrongful death claim against a Nevada tavern owner who illegally sold her brother alcohol, allegedly resulting in her brother's death in a highway collision. The opinion not only adversely affected petitioner, it affected *all* claimants in Nevada who might assert "dramshop" liability against tavern owners who unlawfully sell alcohol to minors or intoxicated persons, followed by a highway collision. Conversely, it benefitted *all* tavern owners and liquor vendors in Nevada, by reducing their exposure to legal accountability for illegal sales of alcohol, and lowering their liability insurance rates. *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170 (1996), dissenting opinion, App. 17a.

One of those tavern owners and liquor licensees was Justice Rose himself. In casting the "swing vote" against petitioner, he benefitted his personal financial interests in his tavern.

The 3-to-2 opinion of the Nevada Supreme Court was signed by Justices Young, Shearing and Rose. *Snyder v. Viani*, 110 Nev. 1339, 885 P.2d 610 (1994). The remaining two justices, Steffen and Springer, filed a dissenting opinion, holding that petitioner's "dramshop liability" lawsuit stated a valid cause of action that ought to be decided by a jury.

On February 1, 1995, petitioner SHAWNA SNYDER filed a motion to disqualify Justice Rose pursuant to Nevada Rules of Appellate Procedure 35(a), asserting under oath that after the November 30, 1994 (first) decision of the Nevada Supreme Court, she had learned for the first time that Justice Rose himself owned a liquor license and a tavern. Petitioner moved for a rehearing of her appeal, and for disqualification of Justice Rose. She also requested that Justice Rose refrain from voting on the issue of his own disqualification, citing Nevada Revised Statutes 1.225(4), which provides that:

> Any party to an action or proceeding seeking to disqualify a justice of the supreme court for actual or implied bias shall file a charge in writing, specifying the facts upon which such disqualification is sought. Hearing on such charge shall be had before the *other* justices of the supreme court. (Emphasis supplied).

Petitioner's specification of the facts upon which she sought disqualification included the fact that Justice Rose owned, at all times relevant, one or more taverns in Nevada, that he was the owner of a liquor and gambling license, and that he had promised fellow tavern owners, through his agent, that he would protect them from dramshop liability, if re-elected to the Nevada Supreme Court. Petitioner further asserted that Justice Rose was disqualified because his vote, while adverse to her, benefitted Justice Rose's own financial interest in his tavern. Petitioner's motion also sought to vacate the first opinion, and requested a rehearing before non-disqualified judges, pursuant to Rule 40, Nevada Rules of Appellate Procedure.

On May 3, 1996, the Nevada Supreme Court issued its second opinion, authored by Justice Young, and concurred in by Justice Shearing and Rose. This decision denied

petitioner's motion to disqualify Justice Rose and to vacate the opinion. It also held that Justice Rose would be permitted to vote on the issue of his own disqualification from sitting on the rehearing case. *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170 (1996), App. 17a. In this second 3-to-2 opinion, the same majority of the Nevada Supreme Court concluded that petitioner, through "imputed knowledge" of her former counsel, had actual or constructive knowledge of Justice Rose's ownership of the tavern, and that this precluded petitioner from raising her claim of disqualification, under NRAP 35(a) because it was not asserted prior to the court's first opinion. The court also concluded that Justice Rose's ownership of a tavern did not create a pecuniary interest in petitioner's case sufficient to disqualify him from sitting, either on the first case, or on the second disqualification case.

BASIS CLAIMED FOR GRANTING WRIT

This case presents an important issue which was resolved by the Nevada Supreme Court in a way which is inconsistent with this Court's decisions and petitioner's basic right to Due Process. In this case, Justice Rose was under a duty to disclose several material facts to petitioner, prior to undertaking to sit as a judge on her appeal. Specifically, Justice Rose was obligated to disclose his ownership interest in a tavern or taverns, which interest was directly adverse to petitioner's legal position in the case. Furthermore, during Justice Rose's 1994 judicial re-election campaign, shortly before his November 30, 1994 swing vote in petitioner's case, he made promises through his employees and campaign staff that appeared to commit him to voting adversely to petitioner's position, and in favor of the liquor industry of which he was a part. *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170 (1996), dissenting opinion. App. 38a.

In any judicial proceeding, the most fundamental requirement of due process is an impartial tribunal. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). This Court has consistently recognized that due process requires the disqualification of a judicial officer in any situation where extreme personal biases or prejudices will affect the outcome of the decision. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1985).

In *Lavoie*, this Court held that a state supreme court justice had wrongfully participated in a case in which he had a disqualifying interest. The underlying action was an insurance bad faith case in which an Alabama jury awarded $3.5 million in punitive damages to the plaintiff. The judgment was affirmed in a 5-4 *per curiam* decision of the Supreme Court of Alabama, with the swing vote being cast by Alabama Supreme Court Justice Embry. While a motion for rehearing of the appeal was pending, the appellant learned that Justice Embry had filed two actions against other insurance companies in an Alabama court, alleging bad-faith failure to pay claims and seeking punitive damages.

In *Lavoie*, this Court addressed the question of what constitutes a disqualifying interest. In doing so, it reviewed some of its pivotal precedents. After briefly discussing *Tumey*, *supra*, this Court stated:

> More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with

> precision." *Ibid.* Nonetheless, a reasonable formulation of the issue is whether the "situation is one 'which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'" *Ward v. Village of Monroeville*, 409 U.S., at 60.

Lavoie, 475 U.S., at 822; *see also Exxon Corp. v. Heinze*, 32 F.3d 1399, 1403 (9th Cir. 1994).

While a "direct and substantial interest" (*Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) "cannot be defined with precision" (*In re Murchison*, 349 U.S. 133, 136 (1955)), it can be measured by determining whether, under all the facts and circumstances, there would be a "possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." *Ward*, 409 U.S., at 60; internal quotation marks omitted.

After reviewing all of the relevant circumstances, this Court determined that Justice Embry's interest in his own bad-faith cases disqualified him from participating in the *Lavoie* case. One of the factors considered by this Court was that the *Lavoie* case was a final pronouncement of Alabama's highest court and, therefore, the decision would have effect as legal precedent on cases in which Justice Embry had an interest. This Court noted that there was never any claim that Justice Embry had a *direct* interest in the case against Aetna Life Insurance Company. That fact notwithstanding, this Court concluded that the "appearance of justice" would best be served by vacating the decision and remanding for further proceedings.

Another instructive case is *State of California v. Kleppe*, 431 F.Supp. 1344 (C.D. Cal. 1977). As in *Lavoie*, the disqualified judge in *Kleppe* did not have an interest in any of

the parties directly before the court. The judge in *Kleppe* owned shares of stock in Union Oil Company. While Union Oil was not a party to the proceedings, its fortune could have been affected by the precedent setting effect of the decision. This, in turn, could have affected the value of the judge's ownership interest. Thus, both *Lavoie* and *Kleppe* support the proposition that a judge may have a disqualifying interest in a case, regardless of the fact that he has no direct interest in any of the parties before the court.

The circumstances surrounding Justice Rose's ownership of a tavern, particularly when viewed in light of his election campaign promises, presents a situation "'which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'" *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). As demonstrated in the dissenting opinion of Justices Steffen and Springer in the second decision, *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170, 178 (1996), App. 38a, during the time in which petitioner's appeal was under submission to the Nevada Supreme Court, Justice Rose stated his intention to protect his own private interests, as well as those of his fellow tavern owners, in any future dramshop litigation. Indeed, he solicited political campaign contributions, by asserting, in effect, that he would *not* "hold the balance nice, clear and true." *Id.* Local tavern owners circulated letters within the community stating an urgent message that all tavern owners had a direct and substantial financial interest in having Justice Rose participate in "dram shop" cases. The interest was characterized as being sufficiently direct that the very "livelihood" of Nevada tavern owners depended upon Justice Rose's votes in these cases. Because Justice Rose was, himself, a tavern owner, and a liquor and gambling licensee, there is an inappropriate connection between his ownership interest and his participation in the case which is inconsistent

with this Court's decisions. His interest in the tavern cannot be characterized as "so remote, trifling or insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual." *Tumey v. Ohio*, 273 U.S. 510, 531 (1927) (citation omitted).

And, as demonstrated in the dissenting opinion of Justice Steffen in the second opinion, the majority's decision should be vacated because Justice Rose participated in this opinion despite his clear interest in the case. *Snyder v. Viani*, 112 Nev. ___, 916 P.2d 170, 178 (1996). Justice Rose's participation in the second opinion, including his voting on the issue of his own disqualification, violated petitioner's Due Process right to a fair and impartial tribunal. Furthermore, his participation in the second opinion was a clear violation of Nevada Revised Statute 1.225(4), providing that:

> **Grounds and procedure for disqualifying supreme court justices.**
>
> . . . .
>
> 4. Any party to an action or proceeding seeking to disqualify a justice of the supreme court for actual or implied bias shall file a charge in writing, specifying the facts upon which such disqualification is sought. Hearing on such charge shall be had before the *other justices* of the supreme court. (Emphasis supplied) App. 17a.

Petitioner requested Justice Rose not to participate in the decision on the issue of his own disqualification. Justice Rose rejected this request, and participated in the (second) 3-to-2 opinion of the Court, presumably authored by Justice Young, with Justices Rose and Shearing concurring. Justice Rose also filed a specially concurring opinion. App. 33a.

In *Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.*, 508 U.S. 602 (1993), this Court reviewed some of its decisions concerning disqualifying interests and noted that "Justice," indeed, "must satisfy the appearance of justice." As Justice Scalia recently reminded us: "Wise observers have long understood that the appearance of justice is as important as its reality." *J.E.B. v. Alabama ex rel. T.B.*, ___ U.S. ___, ___ n. 3, 114 S.Ct. 1419, 1438 n. 3 (1994) Scalia, J., dissenting. Thus, the United States Congress has enacted 28 U.S.C. § 455(a), which provides that a judge is disqualified where his impartiality might reasonably be questioned. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

Similarly, Canon 3E of the Nevada Code of Judicial Conduct provides: "A judge shall perform the duties of a judicial office impartially and diligently." In pertinent part, the Canon also states: "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . .." Furthermore, a commentary to the Canon states that, "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." (App.186a)

The question of whether a judge's impartiality might reasonably be questioned calls for the application of an objective standard. In *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 499 U.S. 820 (1980), the court held that the test is whether an objective, disinterested lay observer, fully informed of the facts underlying the grounds upon which recusal was sought, would entertain a significant doubt about the judge's impartiality. See also *Tyson v. State*, 622 N.E.2d 457 (Ind. 1993), where

the Chief Justice of the Indiana Supreme Court recused himself in a highly publicized case, observing that the test is whether an objective person, informed of all the surrounding circumstances, would have a reasonable basis for doubting the judge's impartiality. In the present case, it is clear that any reasonable observer, informed of such facts and circumstances, would entertain a significant doubt about Justice Rose's impartiality in petitioner's case.

Canon 5 of the Nevada Code of Judicial Conduct states that, "[a] judge or judicial candidate shall refrain from inappropriate political activities." Justice Rose violated this Canon when, acting through his employee and with the express, prior authorization of his campaign staff, he committed himself to voting against dram shop liability and nearly any other legal result that may have an adverse affect on his fellow tavern owners. App. 188a.

Canon 4 of the Nevada Code of Judicial Conduct requires that, "[a] judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations." Justice Rose has violated this Canon by promising to continue to protect the interests of his fellow tavern owners by capitalizing on his own conflict of interest. His conduct may be perceived by an objective lay person as an exploitation of his judicial position. App. 187a. Canon 2 of the Nevada Code of Judicial Conduct states: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." App. 185a. Canon 1 states that, "[a] judge shall uphold the integrity and independence of the judiciary." App.184a.

Justice Rose's conduct has violated these judicial canons of ethics by compromising the integrity and independence of the Nevada Judiciary. More importantly, he has damaged public confidence in the judiciary's ability to be impartial.

CONCLUSION

Petitioner had a right to have her appeal in the Nevada Supreme Court heard by a panel of justices who had no financial interest in the outcome of her case. Nevada Supreme Court Justice Rose failed to disclose to petitioner the fact that the justice owned a tavern himself, and a financial interest in the outcome of petitioner's case. When Justice Rose cast the "swing vote" in petitioner's appeal, he was, in effect, acting as a judge in his own case. His conduct in doing so violated several Canons of the Nevada Code of Judicial Conduct. It is the type of behavior which would cause a reasonable person to question his impartiality. Justice Rose was given an opportunity to correct this violation, when petitioner requested his recusal from her case, and asked for a rehearing of her appeal. The justice's refusal to do so, and his voting upon the very issue of his own disqualification, violated Nevada statutory law, and constituted a second violation of petitioner's Fourteenth Amendment right of Due Process. This Court ought to issue a writ of certiorari, vacate the judgment of the Supreme Court of Nevada, and remand the case for further proceedings consistent with the principles of Due Process of Law. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 829 (1985).

Respectfully submitted,

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